Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1979

No. 79-1474

AMERICAN AMUSEMENT COMPANY, INC.,
a Michigan corporation,
Appellant,

vs.

DEPARTMENT OF REVENUE,
STATE OF MICHIGAN,
Appellee.

HARRY V. MOHNEY,
Appellant,

vs.

DEPARTMENT OF REVENUE,
STATE OF MICHIGAN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

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AMERICAN AMUSEMENT COMPANY, INC.,
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DEPARTMENT OF REVENUE,
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DEPARTMENT OF REVENUE,
STATE OF MICHIGAN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

Appellants, American Amusement Co., Inc., and Harry V. Mohney, appeal from a denial of their application for leave to appeal to the Michigan Supreme Court. In an

Order dated December 14, 1979, the Michigan Supreme Court was not persuaded that the question presented by the appellants should be reviewed. This Order, in effect, upheld a Michigan Appeals Court ruling that the Michigan statute in question, MCLA 205.94; MSA 7.555 (PA 1937 No. 94), as applied in this case, is not unconstitutional as being violative of the equal protection guarantee of the Fourteenth Amendment to the United States Constitution and Article 9, Section 3 of the Michigan Constitution of 1963.

OPINIONS BELOW

The Order of the Michigan Supreme Court denying application for leave to appeal, which appears in the appendix hereto, p. A1, *infra,* is reported at 407 Michigan Reports 941 (1979).

The Opinion of the Michigan Court of Appeals, which appears in the appendix hereto, p. B1, *infra,* is reported at 91 Michigan Appeals 573 (1979); 283 NW2d 803.

The Opinion of the Michigan Court of Claims, which appears in the appendix hereto, p. C1, *infra,* is unreported.

JURISDICTION

The Judgment of the Supreme Court of Michigan, denying leave to appeal, was entered on December 14, 1979. See p. A1, *infra.*

This appeal is being docketed in this Court within ninety (90) days from the denial of leave to appeal below. The jurisdiction of this Court is invoked under 28 USC § 1257(2).

QUESTION PRESENTED

Whether a Michigan statute, MCLA 205.94; MSA 7.555 (PA 1937 No. 94), is violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and Article 9, Section 3 of the Michigan Constitution of 1963 when applied to levy and assess a use tax on non-copyrighted film used by appellants in motion picture theatres operated by appellants, there being no such tax imposed on copyrighted film, newspapers, or other periodicals of general circulation.

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment, United States Constitution:

"Nor . . . shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

Article 9, Section 3, Michigan Constitution of 1963:

". . . Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates."

Michigan statute: MCLA 205.94(o); MSA 7.555 (PA 1937 No. 94):

"The tax hereto levied shall not apply to: Newspapers and periodicals, as admitted under present federal postal laws and regulations as second class mail matter or as controlled circulation publications or as qualified to accept legal notices for publication in this state, as defined by law, or any other newspaper or periodical of general circulation, established at least two years, and published at least once a week, whose total content shall consist of at least 20% local news matter, and copyrighted motion picture films. . ."

Title 17 USC 102 Subject Matter of Copyright.

THE FEDERAL QUESTION

Appellants initiated this suit in the Michigan Court of Claims seeking to recover taxes paid under protest pursuant to the Michigan statute in question. At the earliest stage of the proceedings below, the appellants raised the claim that the Michigan statute, MCLA 205.94; MSA 7.555 (PA 1937 No. 94), was unconstitutional as violative of the equal protection guarantee of the Constitution of the United States, Amendment Fourteen.

Appellants argued that the above-cited Michigan statute was arbitrary and capricious and created a discriminatory classification without a rational and logical relationship to any state purpose.

The Opinion of the Michigan Court of Claims (p. C1, *infra*), agreed with appellants' contention that "the distinction between copyrighted and non-copyrighted films for tax exemption purposes is unconstitutional for the reasons cited by the plaintiffs", however, the Court of Claims refused to grant appellants the relief sought and entered Judgment denying appellants' claim for a refund of the taxes paid under protest. (see p. C1, *infra*)

The Fourteenth Amendment, Equal Protection claim was again reiterated by appellants before the Michigan Court of Appeals. Appellants renewed their argument that the Michigan statute was arbitrary and capricious and that the statute created a discriminatory classification without a rational and logical relationship to any legitimate state purpose.

The Michigan Court of Appeals denied appellants the relief requested. The Court expressly rejected appellants' argument that the distinction between copyrighted and non-copyrighted film had no rational basis and therefore

did not comport with the requirements of the Equal Protection Clause.

Appellants then sought review from the Michigan Supreme Court. Appellants again asserted the Fourteenth Amendment claim as set forth above. In an Order dated December 14, 1979, the Michigan Supreme Court denied appellants' application for leave to appeal. The Court stated that it was not persuaded that the question presented by appellants should be reviewed.

STATEMENT OF THE CASE

The appellants, American Amusement Company, Inc., and Harry V. Mohney, are engaged in the operation of motion picture theatres for entertainment purposes. The motion picture theatres are open to the adult general public and are located within the State of Michigan.

Originally, appellants were assessed and levied a use tax pursuant to the provisions of a Michigan statute, MCLA 205.94; MSA 7.555 (PA 1937 No. 94), *on non-copyrighted motion picture films* used by appellants at motion picture theatres operated by them. The pertinent portion of the statute in question reads as follows:

> MCLA 205.94(4)(o):
>
> The tax levied shall not apply to:
>
> Newspapers and periodicals, as admitted under present federal postal laws and regulations as second class mail matter or as controlled circulation publications or qualified to accept legal notices for publication in this state, as defined by law, or any other newspaper or periodical of general circulation, established at least two years, and published at least once a week, and copyrighted motion picture films. All tangible per-

sonal property used or consumed and not becoming a component part of newspapers and periodicals, and copyrighted motion picture film is subject to tax.

The tax assessed in the amount of fourteen thousand three hundred seventy eight and 84/100 ($14,378.84) dollars, including interest in the case of appellant, American Amusement Company, Inc., and in the amount of two thousand four hundred fourteen and 65/100 ($2,414.65) dollars, including interest in the case of appellant, Harry V. Mohney, has been paid under protest.

Appellants asserted that the use tax exemption for copyrighted motion picture film and the imposition of a use tax on non-copyrighted motion picture film was, and is, unconstitutional.

Appellants argued in the lower courts that the state statutory section in question, MCLA 205.94(4)(o), *supra*, was, and is, unconstitutional in that it is arbitrary, unreasonable, and capricious; thereby creating a discriminatory classification without a reasonable, rational, or logical relationship to any legitimate state purpose. Appellants further contended that there was no rational or reasonable basis for the statute in question, and thus, was violative of the Fourteenth Amendment of the United States Constitution as well as a violation of Article 9, Section 3 of the Michigan Constitution of 1963.

In an Opinion by Judge Leo W. Corkin of the Michigan Court of Claims dated December 21, 1977, see p. C1, *infra*, it was held that the state statute in question was unconstitutional for the reasons cited by the plaintiffs. However, the Court denied the requested relief.

Appellants then appealed to the Michigan Court of Appeals. There, appellants asserted the same argument that was asserted in the lower Court, i.e., that the state

statute was unconstitutional as being violative of the equal protection guarantees of both the Federal and State Constitutions.

In an opinion from the Michigan Court of Appeals dated August 6, 1979, see p. B1, *infra*, it was held that the distinction in assessing taxes on copyrighted and non-copyrighted films was supported by a rational basis and did not violate the equal protection clause of the United States or the Constitution of the State of Michigan.

Appellants then applied for leave to appeal to the Michigan Supreme Court. Appellants were asserting the same arguments that were made in the lower Courts, i.e., unconstitutionality of the state statute.

In a slip opinion from the Michigan Supreme Court dated December 14, 1979, see p. A1, *infra*, appellants' application for leave to appeal was denied. The Court stated that it was not persuaded that the question presented by the appellants should be reviewed.

THE QUESTION IS SUBSTANTIAL

The question as to Fourteenth Amendment implications of assessing taxes on non-copyrighted films and exempting copyrighted films from the same tax is a novel and substantial one. This question has never before been addressed by this Court.

The taxing power of the state must be exercised within reasonable limits. While the distinctions need not be precise, nor based on scientific certainty, they must be reasonable, logical, and not discriminatory. The state must proceed on a rational basis and may not resort to a classification that is palpably arbitrary. *Allied Stores of Ohio v Bowers*, 358 US 522; 79 S Ct 437; 3 L Ed 2d 480 (1959);

American Sugar Refining Company v Louisiana, 179 US 89; 21 S Ct 43; 45 L Ed 102 (1909); *Quong Wing v Kirkendall,* 223 US 59; 32 S Ct 192; 56 L Ed 350 (1912); *Carmichael v Southern Coal and Coke,* 301 US 495; 57 S Ct 868; 81 L Ed 1245 (1936); *Kahn v Shevin,* 416 US 351; 94 S Ct 1734; 40 L Ed 2189 (1974).

Appellants submit that the distinction drawn between copyrighted film and non-copyrighted film in assessing taxes, pursuant to the state statute, is without a rational or logical basis which creates a lack of uniformity upon the class which the tax operates, in direct violation of the Fourteenth Amendment of the Constitution of the United States and Article 9, Section 3 of the Michigan Constitution of 1963.

Another major issue before the Court is what constitutes copyright within the meaning of the statute. The statutory provision is as follows:

17 USC 102 Subject matter of copyright. In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories. . .

(6) motion picture and other audiovisual works. . .

Therefore, appellants contend that the motion picture films owned by them are protected by the copyright statute, *supra,* because they are "original works of authorship fixed in a tangible medium" pursuant to the statute. Hence, the motion picture films used by appellants in their businesses should be considered "copyrighted" by the Department of Revenue, State of Michigan because of the requisites of the copyright statute, *supra.*

CONCLUSION

For these reasons, this Court should note jurisdiction of this appeal.

Appellants respectfully request oral argument.

Respectfully submitted,

MICHAEL Y. SANDBORN
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Lansing, Michigan 48906
Counsel for Appellants

APPENDIX

APPENDIX A

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN. Held at the Supreme Court Room, in the City of Lansing, on the 14th day of December in the year of our Lord one thousand nine hundred and seventy-nine.

Present the Honorable

MARY S. COLEMAN,
Chief Justice,
THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

CR 27-235

COA: 78-2535, 78-2536

LC: 4333, 4334

AMERICAN AMUSEMENT COMPANY, INC.,
a Michigan corporation,
Plaintiff-Appellant,

v 63665

DEPARTMENT OF REVENUE, STATE OF MICHIGAN,
Defendant-Appellee.

HARRY V. MOHNEY,
Plaintiff-Appellant,

v 63666

DEPARTMENT OF TREASURY,
REVENUE DIVISION,
Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the question presented should be reviewed by this Court.

1205

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 14th day of December in the year of our Lord one thousand nine hundred and seventy-nine.

/s/ Calvin R. Davis
Deputy Clerk

(Seal)

APPENDIX B

STATE OF MICHIGAN
COURT OF APPEALS

(AUG 06 1979)

No. 78-2535

AMERICAN AMUSEMENT COMPANY, INC.,
a Michigan corporation,
Plaintiff-Appellant,

v

DEPARTMENT OF REVENUE, STATE
OF MICHIGAN,
Defendant-Appellee.

No. 78-2536

HARRY V. MOHNEY,
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY
REVENUE DIVISION,
Defendant-Appellee.

Before: B.B. MacKenzie, P.J., D.E. Holbrook, Jr., and Cynar, JJ.

CYNAR, J.

In 1973, plaintiff American Amusement Company, Inc. was assessed a use tax of $14,378.84 for the exhibition of noncopyrighted "adult films". In the same year plaintiff Harry V. Mohney was assessed a tax of $2414.65 as a result of his showing similar films. In each case the plaintiffs paid the tax under protest and instituted suit in the Court of Claims to recover the amount paid. They

now appeal as of right from a decision of the Court of Claims denying their request for a refund.

MCL 205.93; MSA 7.555(3) provides for the levying of a "specific tax for the privilege of using, storing or consuming tangible personal property in this state * * *" Other sections of the Use Tax Act, MCL 205.91 *et seq;* MSA 7.555(1) *et seq*, provide numerous exemptions from this tax. It has also been held that property subject to sales tax under the Sales Tax Act, MCL 205.51 *et seq;* MSA 7-521 *et seq*, is also exempt from the use tax. *Banner Laundering Co v State Board of Tax Administration,* 297 Mich 419, 428; 298 NW2d 73 (1941).

Plaintiffs did not contend that they fit into any of the statutory or judge-made exemptions to the use tax. Rather they noted that MCL 205.94(o); MSA 7.555(4)(o),[1] provides an exemption for copyrighted motion picture films and argued that the disparate treatment between copyrighted and noncopyrighted films violated equal protection. They further argued that both copyrighted and noncopyrighted films should fall within the statutory exemption.

The trial judge agreed that the distinction between the two types of films violated the equal protection clause of the Fourteenth Amendment of the United States Constitution. However, he concluded that this violation necessitated striking down the exemption for copyrighted films

1. That section states:

"The tax levied shall not apply to:

"(o) Newspapers and periodicals, as admitted under present federal postal laws and regulations as second class mail matter or as controlled circulation publications or qualified to accept legal notices for publication in this state, as defined by law, or any other newspaper or periodical of general circulation, established at least 2 years, and published at least once a week, *and copyrighted motion-picture films.* All tangible personal property used or consumed and not becoming a component part of newspapers and periodicals, and copyrighted motion-picture files is subject to tax." (Emphasis added.)

rather than applying it to all films. Accordingly, he concluded that the equal protection violation present in the use tax scheme did not relieve plaintiffs of their liability to pay the use tax in this instance.

We agree with the trial court's conclusion that plaintiffs are liable for the payment of use tax under MCL 205.93; MSA 7.555(3). However, we disagree with his conclusion that equal protection is violated as a result of the disparate treatment of copyrighted and noncopyrighted films under the Use Tax Act.

As a general rule, Legislature enactments are clothed with a presumption of constitutionality. *People v McQuillan,* 392 Mich 511, 536-537; 221 NW2d 569 (1974). This presumption appears to be especially strong where tax legislation is concerned. In *Lehnhausen v Lake Shore Auto Parts Co,* 410 US 356, 364; 93 S Ct 1001; 35 L Ed 2d 351 (1973), the United States Supreme Court stated:

> "[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification. * * * There is a presumption of constitutionality which can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes."

Similarly, in *Thoman v City of Lansing,* 315 Mich 566, 576; 24 NW2d 213 (1946) our Supreme Court noted:

> "The presumption of constitutionality following taxing statutes is stronger than applies to laws generally and only where a taxing system clearly and palpably violates the fundamental law will it be held invalid."

However, this is not to say that the states are exempt from the requirements of the equal protection clause of

the Fourteenth Amendment when enacting taxation legislation. As stated in *Allied Stores of Ohio v Bowers,* 358 US 522, 527-528; 79 S Ct 437; 3 L Ed 2d 480 (1959):

> "[T]here is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' . . . That statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy."

See also *WS Butterfield Theatres Inc, v Dep't of Revenue,* 353 Mich 345, 353; 91 NW2d (1958).

In determining whether a particular taxation scheme is rationally based it must be remembered that the equal protection clause:

> "imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value." *Lehnhausen v Lake Shore Auto Parts Co, supra,* 360-361.

Our Supreme Court echoed this viewpoint in *Banner Laundering Co v State Board of Tax Administration, supra,* 433, stating:

> "Granting the power of classification, we must grant Government the right to select the differences upon which the classification shall be based, and they need not be great or conspicuous. * * * The State is not bound by any rigid equality. This is the rule; its limitation is that it must not be exercised in 'clear and hostile discriminations between particular persons and classes.' * * * Thus defined and thus limited, it is a vital principle, giving to the Government freedom to meet its exigencies, not binding its action by rigid formulas but apportioning its burdens and permitting it to make those 'discriminations which the best interest of society require.' "

In order to prevail on their claim of an unconstitutional classification in the Use Tax Act, plaintiffs must "negative every conceivable basis which might support it." *Lehnhausen v Lake Shore Auto Parts Co, supra,* 364. See also *WS Butterfield Theatres Inc v Dep't of Revenue, supra,* 353. This burden extends beyond showing that the classification bears no rational basis to revenue raising. Classifications in tax schemes have been upheld on such bases as encouraging useful industries to locate within the state, *Allied Stores of Ohio v Bowers, supra,* 528-529, or promoting the operation of charitable religious or scientific organizations. *Banner Laundering Co v State Board of Tax Administration, supra,* 431.

Plaintiffs have failed to meet their burden in the present case. The different treatment between copyrighted and noncopyrighted films may be upheld on a number of different grounds. Since copyright protection extends only to "original works of authorship" 17 USC 102(a) (1976), exempting copyrighted films from the Michigan use tax tends to promote originality and thereby advances knowledge generally. Further, by encouraging one to copyright one's films, the use tax exemption promotes the develop-

ment of a centralized body of information relating to the ownership of motion picture films. Neither of these grounds have in any way been refuted by plaintiffs. We therefore conclude that the distinction between copyrighted and non-copyrighted films in the Michigan Use Tax is supported by a rational basis and thus comports with the requirements of the equal protection clause.[2]

Thus, while we have traveled along a different road of reasoning, the journey ends with the same result. The judgment of the trial court, denying plaintiffs' claims for a refund of the taxes paid under protest, is affirmed. Costs to defendant.

---

2. We note that the trial judge also stated that the copyrighted film exemption in the use tax scheme violated the uniform taxation provision of Const 1963, art 9, § 3. Under this provision a classification in a taxing scheme is upheld if supported by a "reasonable basis", *Avis Rent-A-Car v Romulus*, 65 Mich App 119, 129; 237 NW2d 209 (1975) *aff'd* 400 Mich 337; 254 NW2d 555 (1977). Thus, for the same reasons that the classification here was upheld against the equal protection challenge, no violation of the uniform taxation clause is present here.

APPENDIX C

STATE OF MICHIGAN
COURT OF CLAIMS

File No. 4333

AMERICAN AMUSEMENT COMPANY, INC.,
A MICHIGAN CORPORATION,
Plaintiff,

v.

DEPARTMENT OF REVENUE, STATE OF MICHIGAN,
Defendant.

File No. 4334

HARRY V. MOHNEY,
Plaintiff,

v.

DEPARTMENT OF TREASURY, REVENUE DIVISION,
Defendant.

OPINION

Plaintiffs in these actions own and operate motion picture theatres that show non-copyrighted films that are usually termed X-rated or 'adult' films. The theatres are open to the general public and are operated in the same manner as motion picture theatres showing copyrighted films.

Pursuant to the provisions of MCLA §205.94 (MSA §7.555) defendant has assessed and levied a use tax on non-copyrighted motion picture films used by plaintiffs in motion picture theatres owned and operated by them in the State of Michigan. The tax assessed, including

interest, against American Amusement Company, Inc. was in the amount of $14,378.84 and in the amount of $2,414.65 against Harry V. Mohney.

MCLA §205.94, Sec. 4(o) provides in pertinent part as follows:

"The tax levied shall not apply to:

. . . (o) Newspapers and periodicals, as admitted under present federal postal laws and regulations as second class mail matter or as controlled circulation publications or qualified to accept legal notices for publication in this state, as defined by law, or any other newspaper or periodical of general circulation, established at least 3 years, and published at least once a week, and copyrighted motion-picture films. All tangible personal property used or consumed and not becoming a component part of newspapers and periodicals and copyrighted motion-picture files is subject to tax."

It is plaintiffs' claim that the foregoing cited section of the statute is unconstitutional in that it singles out copyrighted motion picture films as being exempt as opposed to all motion picture films being exempt. In plaintiffs' view, the making of a distinction between copyrighted and non-copyrighted film so far as public movie houses is concerned is arbitrary, unreasonable and capricious; creates a discriminatory classification without any reasonable, rational, or logical relationship to any legitimate state purpose; and that it has no reasonable, rational, or logical relationship to the purpose of the statute itself (to raise revenue), and thus, is violative of the equal protection clauses of the Federal and State Constitutions. In support of their contentions plaintiffs cite the following:

The title to MCLA 205.91 which provides:

"AN ACT to provide for the levy, assessment and collection of a specific excise tax on the storage, use or consumption in this state of tangible personal property and certain services; to appropriate the proceeds thereof; and to prescribe penalties for violations of the provisions of this act."

Article 9, Sec. 3 of the Michigan Constitution of 1963 which provides in pertinent part:

. . . "Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates."

Defendant quite properly points out that what plaintiffs are complaining about is the use of the word "copyrighted" as applied to motion picture films. They are asking that this Court, in effect, strike the word from the statute so that all motion pictures would be exempt from a use tax (apparently the Sales Tax Act, MCLA 205.54 a (h) applies the same exemption). Thus, if this Court were to find that this particular provision of the use tax were to be declared unconstitutional it would result in the comparable sales tax provision being unconstitutional. This in defendants' view was certainly not the intent of the legislature.

Defendant concedes that the reason for the exemption was not in fact, to limit free speech or oppress the so-called adult films. It can only speculate as to what the legislature was trying to accomplish by exempting only copyrighted motion picture films as it is certainly not clear from the act itself.

Defendant first takes the position that the legislature had the specific intent of exempting copyrighted motion pictures from sales or use tax so it is not arbitrary -

certainly a non sequitur. Secondly, the defendant points out that if the Court were to declare unconstitutional a distinction between copyrighted and non-copyrighted motion picture films for tax purposes it would only do away with the exemption for all motion picture films and so provide the state with greater revenues - a rather unusual reason for upholding the constitutionality of the provision.

Suffice it to say that this Court agrees with plaintiffs that the distinction between copyrighted and non-copyrighted films for tax exemption purposes is unconstitutional for the reasons cited by plaintiffs. However, the Court is not of the opinion that it can only declare the word "copyrighted" unconstitutional. It would therefore declare the exemption as to copyrighted films to be unconstitutional.

A judgment may enter in accordance with this opinion, and denying plaintiffs' claim for a refund of the taxes paid under protest.

DATED: Dec. 21, 1977

/s/ Leo W. Corkin
Leo W. Corkin, Circuit Judge
acting in the Court of Claims
for the State of Michigan

APPENDIX D

STATE OF MICHIGAN
IN THE SUPREME COURT

Michigan Supreme Court No.
63665

Court of Appeals No. 78-2535

AMERICAN AMUSEMENT COMPANY, INC.,
a Michigan corporation,
Plaintiff/Appellant,

vs.

DEPARTMENT OF REVENUE, STATE OF MICHIGAN,
Defendant/Appellee.

Michigan Supreme Court No.
63666

Court of Appeals No. 78-2536

HARRY V. MOHNEY,
Plaintiff/Appellant,

vs.

DEPARTMENT OF TREASURY, REVENUE DIVISION,
Defendant/Appellee.

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

MICHAEL Y. SANDBORN, being first duly sworn, deposes and says that on the 23rd day of January, 1980, he did mail a copy of Plaintiff/Appellant's NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES, to E. Raymond O'Malley, Assistant Attorney

General, 1st Floor, Treasury Building, Lansing, MI 48922, by placing same in a properly addressed envelope and depositing in the United States Mail at Lansing, Michigan.

/s/ Michael Y. Sandborn
Michael Y. Sandborn

Subscribed and sworn to before me this 23rd day of January, 1980.

/s/ Beverly A. Hundt
Beverly A. Hundt, Notary Public
Ingham County, Michigan

My Commission expires: 5/22/82

STATE OF MICHIGAN
IN THE SUPREME COURT

Michigan Supreme Court No.
63665

Court of Appeals No. 78-2535

AMERICAN AMUSEMENT COMPANY, INC.,
a Michigan corporation,
Plaintiff/Appellant,

vs.

DEPARTMENT OF REVENUE, STATE OF MICHIGAN,
Defendant/Appellee.

Michigan Supreme Court No.
63666

Court of Appeals No. 78-2536

HARRY V. MOHNEY,
Plaintiff/Appellant,

vs.

DEPARTMENT OF TREASURY, REVENUE
DIVISION,
Defendant/Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that, AMERICAN AMUSEMENT COMPANY, INC., and HARRY V. MOHNEY, the Plaintiff/Appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Michigan,

affirming the dismissal of the Complaint, entered in this action on December 14, 1979.

This appeal is taken pursuant to 28 USC 1257(2).

/s/ Michael Y. Sandborn
Michael Y. Sandborn (P 25878)
817 Center St.
Lansing, MI 48906
Attorney for Plaintiff/Appellants

Dated: 1-22-80

Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

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October Term, 1979

No. 79-1474

AMERICAN AMUSEMENT COMPANY, INC.,
a Michigan corporation,

Appellant,

vs.

DEPARTMENT OF REVENUE,
STATE OF MICHIGAN,

Appellee,

HARRY V. MOHNEY,

Appellant,

vs.

DEPARTMENT OF REVENUE,
STATE OF MICHIGAN,

Appellee.

On Appeal from the Supreme Court of the State of Michigan

MOTION TO DISMISS OR AFFIRM

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Magoun v Illinois Trust & Sav Bank, 170 US 283, 293; 18 S Ct 594; 42 L Ed 1037 (1897)	5
Ohio Oil Co v Conway, 281 US 146, 159; 50 S Ct 310; 74 L Ed 775, 781 (1929)	5
Oliver Iron Mining Co v Lord, 262 US 172, 179; 43 S Ct 526; 67 L Ed 929, 936 (1922)	5
Quong Wing v Kirkendall, 223 US 59; 32 S Ct 192; 56 L Ed 350 (1912)	5
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1937 PA 94, § 4(o); MCLA 205.94(o); MSA 7.555(4)(o)	2
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Michigan Const. 1963, Art 9, § 3	3, 6

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1474

AMERICAN AMUSEMENT COMPANY, INC.,
a Michigan corporation,

Appellant,

vs.

DEPARTMENT OF REVENUE,
STATE OF MICHIGAN,

Appellee,

HARRY V. MOHNEY,

Appellant,

vs.

DEPARTMENT OF REVENUE,
STATE OF MICHIGAN,

Appellee.

On Appeal from the Supreme Court of the State of Michigan

MOTION TO DISMISS OR AFFIRM

Pursuant to United States Supreme Court Rule 16, Appellees move that Appellants' appeal from the Opinion of the Michigan Court of Appeals (JS B1-B6)[1] and from an Order of the Michigan Supreme Court denying leave to appeal, entered December 14, 1979 (JS A1-A2), be dismissed on the following grounds:

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[1] Unless otherwise indicated, numbers in parentheses preceded by "JS" will refer to pages of Appellants' Jurisdictional Statement.

1. That the appeal does not present a substantial federal question; and

2. That the Opinion of the Michigan Court of Appeals is conclusive.

In the alternative, Appellees move that the opinion be affirmed on the grounds that it is manifest that the question on which the decision of this cause depends is so insubstantial as to need no further argument.

I.

THE STATE STATUTORY PROVISION INVOLVED AND THE NATURE OF THE CASE.

A. The State Statutory Provision.

The sole issue presented by this appeal is whether the Michigan use tax[2] contains an unconstitutional classification violating the equal protection clause of the Fourteenth Amendment of the Constitution of the United States because it grants an exemption from tax for the use, storage, and consumption of copyrighted motion-picture films, but contains no similar exemption for the use, storage and consumption of non-copyrighted motion-picture films. Stated alternatively, this appeal draws into question the authority of the Michigan legislature to except from the taxable subject matter of its use tax a class of property defined as "copyrighted motion-picture films."

Section 4(o) of the Michigan Use Tax Act [MCLA 205.94(o); MSA 7.555(4)(o)] exempts from the tax levied upon the use, storage and consumption of tangible personal property:

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[2] 1937 PA 94, as amended; MCLA 205.91 *et seq;* MSA 7.555(1) et seq.

"Newspapers and periodicals, as admitted under present federal postal laws and regulations as second class mail matter or as controlled circulation publications or qualified to accept legal notices for publication in this state, as defined by law, or any other newspaper or periodical of general circulation, established at least 2 years, and published at least once a week, and copyrighted motion-picture films. All tangible personal property used or consumed and not becoming a component part of newspapers and periodicals, and copyrighted motion-picture films is subject to tax."

The foregoing exemption was added to the Michigan use tax by 1950 PA 7 and in its original version the exemption simply read:

"Newspapers and periodicals, as admitted under present federal postal laws and regulations as second class mail matter, and copyrighted motion picture films."

B. The Proceedings Below.

Appellants brought suit in the Michigan Court of Claims for refund of use taxes assessed and paid for the privilege of using, storing and consuming non-copyrighted motion-picture film. The sole contention advanced by the appellants postulated that the distinction between copyrighted and non-copyrighted motion-picture films which inhered in the restriction of the tax exemption to copyrighted motion-picture film was arbitrary, unreasonable, capricious, discriminatory, irrational, and illogical; and that it violated the Equal Protection Clause of U.S. Const. Amend. XIV and the Uniformity Clause of Michigan Const 1963, art 9, § 3.

The Court of Claims agreed "with plaintiffs that the distinction between copyrighted and non-copyrighted films for tax

exemption purposes is unconstitutional ° ° °." (JS C4) Nevertheless, the Court denied refund of the tax by striking the exemption for copyrighted motion-picture films from the statute.

On appeal, the Michigan Court of Appeals upheld the trial court's judgment denying plaintiffs' claims for refund of the use tax. However, it concluded "that the distinction between copyrighted and non-copyrighted films in the Michigan use tax is supported by a rational basis and thus comports with the requirements of the Equal Protection Clause." (JS B6)

The appellants sought leave to appeal which was considered by the Michigan Supreme Court and was "° ° ° DENIED because the Court is not persuaded that the question presented by appellants should be reviewed." (JS A2)

II.

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

The Michigan Court of Appeals noted (JS B5) that the plaintiffs failed to meet their burden to "negative every conceivable basis which might support" [*Lehnhausen* v *Lake Shore Auto Parts Co*, 410 US 356, 364; 93 S Ct 1001; 35 L Ed 2d 351 (1973)] the classification in the Use Tax Act. Further, it stated (JS B5, B6):

> "The different treatment between copyrighted and non-copyrighted films may be upheld on a number of different grounds. Since copyright protection extends only to 'original works of authorship' 17 USC 102(a) (1976), exempting copyrighted films from the Michigan use tax

> tends to promote originality and thereby advances knowledge generally. Further, by encouraging one to copyright one's films, the use tax exemption promotes the development of a centralized body of information relating to the ownership of motion picture films. Neither of these grounds have in any way been refuted by plaintiffs. We therefore conclude that the distinction between copyrighted and noncopyrighted films in the Michigan Use Tax is supported by a rational basis and thus comports with the requirements of the equal protection clause."

There are a host of cases decided by this Honorable Court which uphold reasonable classification for tax purposes. Among such cases are all of the 5 cases[3] cited by the appellants as well as *Bell's Gap R Co* v *Pennsylvania*, 134 US 232; 237; 10 S Ct 533; 33 L Ed 892, 895 (1899); *Magoun* v *Illinois Trust & Sav Bank*, 170 US 283, 293; 18 S Ct 594; 42 L Ed 1037 (1897); *Southwestern Oil Co* v *Texas*, 217 US 114, 121; 30 S Ct 496; 54 L Ed 688, 692 (1909); *Brown-Forman Co* v *Kentucky*, 217 US 563, 573; 30 S Ct 578; 54 L Ed 883 (1909); *Heisler* v *Thomas Colliery Co*, 260 US 245, 255; 43 S Ct 83; 67 L Ed 237, 241 (1922); *Oliver Iron Mining Co* v *Lord*, 262 US 172, 179; 43 S Ct 526; 67 L Ed 929, 936 (1922); *Stebbins* v *Riley*, 268 US 137, 142; 45 S Ct 424, 69 L Ed 884 (1924); *Ohio Oil Co* v *Conway*, 281 US 146, 159; 50 S Ct 310; 74 L Ed 775,

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[3]

Allied Stores of Ohio v *Bowers*, 358 US 522; 79 S Ct 437; 3 L Ed 2d 480 (1959).

American Sugar Refining Co v *Louisiana*, 179 US 89; 21 S Ct 43; 45 L Ed 102 (1909).

Carmichael v *Southern Coal and Coke*, 301 US 495; 57 S Ct 868; 81 L Ed 1245 (1936).

Kahn v *Shevin*, 416 US 351; 94 S Ct 1734; 40 L Ed 2d 189 (1974).

Quong Wing v *Kirkendall*, 223 US 59; 32 S Ct 192; 56 L Ed 350 (1912).

781 (1929); *State Tax Comrs* v *Jackson*, 283 US 527, 537; 51 S Ct 540; 75 L Ed 1248 (1930).

There clearly is a substantial and significant difference between copyright material and non-copyright material. Copyright is a subject matter recognized by the United States Constitution which invests Congress with power to promote the progress of science and useful arts by securing for limited times to authors the exclusive right to their writings.[4] There exists a considerable body of law dealing with copyright.

The Michigan legislature sought to exempt a class of motion-picture films which were worthy of and subject to the copyright ~~production~~ protection and privilege. The conclusion is inescapable that, under all existing precedents, it had the authority to select copyrighted motion-picture films as the beneficiary of its use tax exemption. The legislative power of classification was exercised in a manner consistent with the equal protection clause of the federal constitution.

The appellants also allege (JS 8) that the classification in question violates the Michigan Constitution, Article 9, Section 3. This "state question" was conclusively adjudged against the appellants by the Michigan Court of Appeals (JS B6), which footnoted that:

> "* * * for the same reasons that the classification here was upheld against the equal protection challenge, no violation of the uniform taxation clause is present here."

The jurisdictional statement does not present any substantial federal question. It is so wanting in substance, in view of previous decisions of this Court sanctioning reasonable classifications for tax purposes as to warrant no further argument.

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[4] United States Constitution, Article 1, Section 8, Clause 8.

III.

CONCLUSION

WHEREFORE, Appellees respectfully submit that the question upon which this cause depends is so unsubstantial as not to need further argument, and Appellees respectfully move the Court to dismiss this appeal, or, in the alternative, to affirm the order entered in the cause by the Supreme Court of the State of Michigan.

Respectfully submitted,

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